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LEE BAK SOON

v.

RHB BANK BHD

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COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
LOW HOP BING JCA
RAUS SHARIF JCA
[CIVIL APPEAL NO: C-03-30-2001]

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20 NOVEMBER 2007

BANKRUPTCY: *Notice - Application to set aside - Bankruptcy notice based on summary judgment - Judgment debtor not appealing nor requesting for stay - Whether a final judgment - Whether fully enforceable*

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- Whether judgment debtor committed act of bankruptcy - Bankruptcy Act 1967, s. 3(1)(i), 3(2) - Bankruptcy Rules 1969, r. 95

This was an appeal by the judgment debtor ('JD') against the decision of the learned judge dismissing his application to set aside the bankruptcy notice ('BN') pursuant to r. 95 of the Bankruptcy Rules 1969 ('Rules'). The facts were that the judgment creditor ('JC') had obtained a judgment against the JD for RM129,843.47 under O. 14A Rules of the High Court 1980 ('civil suit'). The JD did not appeal against the civil suit, and the JC proceeded to file the BN in question. Subsequently, *vide* a separate suit, the JC applied for and obtained an order for sale of the charged property ('auction suit'). The JD apparently contested the auction suit, and eventually went on to argue his case before the Supreme Court ('Supreme Court case'). In any event, pursuant to the said auction suit, the JD also invoked r. 95 of the Rules and applied to set aside the BN on the basis: (i) that the JC's claim for legal fees, costs and expenses relating to the Supreme Court case was wrong in law; (ii) that the demand for interest of RM33,797.25 in the BN was wrong in law; and (iii) that since the bidder in the auction suit had not paid the balance price for the charged property within the prescribed 90 days, the 10% deposit paid by the bidder ought to have been forfeited and credited to his account. The facts however showed that none of these arguments were raised by the JD in the civil suit or the auction suit or the Supreme Court case, and that being so, the learned judge disregarded the arguments and dismissed the application. The JD

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appealed and argued that the BN ought nonetheless to be set aside *inter alia* upon the authority of *Re Arunachalam* and *Re United Marine Supply Co.*

Held (dismissing the appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) In the civil suit, the O. 14A judgment which led to the JC's request for the issue of the BN against the JD is a final judgment as the JD had preferred no appeal nor obtained a stay of execution. In the circumstances, the JC is deemed to be a creditor under s. 3(1) of the Bankruptcy Act 1967 and thus entitled to enforce the final judgment. (para 14)

(2) In sharp contrast to *Re Arunachalam* and *Re United Marine Supply Co*, the bankruptcy notice in the instant appeal carries a distinguishing feature in that the JD has made no payment in satisfaction or part satisfaction of a final judgment. The JD's reliance on these authorities was therefore unsustainable. (para 20)

(3) The grounds raised in the JD's application should have been ventilated in the civil suit, the auction suit or the Supreme Court case. The JD's failure or refusal or neglect to do so would militate against the JD's appeal before the High Court and now in the instant appeal in so far as the BN is concerned. The JD's failure, refusal or neglect to raise the aforesaid grounds in the proper forum also demonstrates a total lack of *bona fide* on his part. (paras 21 & 24)

(4) There is no dispute that the BN is in the prescribed form and has stated the consequences of non-compliance therewith and has been served in the prescribed manner under s. 3(2) of the Bankruptcy Act 1967. The JD has failed to comply with the requirements of the JC's BN and thus has committed an act of bankruptcy. It follows that the High Court was right in dismissing the application. (paras 15 & 26)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan penghutang penghakiman ('penghutang') terhadap keputusan yang arif hakim kerana menolak permohonannya untuk mengenepikan notis kebankrapan ('NK') di bawah per. 95 Kaedah-kaedah Kebankrapan 1969 ('Kaedah'). Faktanya adalah, pemiutang penghakiman ('pemiutang') telah memperoleh penghakiman

terhadap penghutang sebanyak RM129,843.47 di bawah A. 14A Kaedah-kaedah Mahkamah Tinggi 1980 ('guaman sivil'). Penghutang tidak merayu terhadap guaman sivil, dan pemiutang kemudian memfailkan NK di sini. Berikutnya, melalui guaman yang berasingan, pemiutang memohon dan memperoleh perintah jualan bagi menjual hartanah yang digadai ('guaman lelongan'). Penghutang kelihatannya telah mencabar guaman lelongan dan meneruskan cabarannya itu ke peringkat Mahkamah Agong ('kes Mahkamah Agong'). Walauapapun, ekoran guaman lelongan di atas, penghutang telah juga menggunapakai per. 95 Kaedah memohon untuk mengenepikan NK atas alasan: (i) bahawa tuntutan pemiutang untuk bayaran guaman, kos dan perbelanjaan berkaitan kes Mahkamah Agong adalah salah di sisi undang-undang; (ii) bahawa tuntutan untuk faedah sebanyak RM33,797.25 di dalam NK adalah salah di sisi undang-undang; dan (iii) bahawa oleh kerana pembida gagal membayar baki harga belian hartanah digadai dalam tempoh 90 hari yang ditetapkan, maka deposit 10% yang dibayar pembida haruslah dirampas dan dikreditkan ke akaunnya. Fakta bagaimanapun menunjukkan bahawa hujah-hujah ini telah tidak dibangkitkan oleh penghutang sama ada di dalam guaman sivil, guaman lelongan ataupun di dalam kes Mahkamah Agong, dan berikutnya, yang arif hakim telah tidak mengendahkannya dan menolak permohonan. Penghutang merayu dan berhujah bahawa NK sepatutnya diketepikan berdasarkan antara lain kepada autoriti *Re Arunachalam d*an *Re United Marine Supply Co.*

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Di dalam guaman sivil, penghakiman A.14A yang membawa kepada permohonan pemiutang untuk mengeluarkan NK adalah satu penghakiman muktamad memandangkan penghutang memilih untuk tidak merayu ataupun memohon pengangguhan pelaksanaan. Dalam keadaan sedemikian, pemiutang adalah dianggap sebagai seorang kreditor di bawah s. 3(1) Akta Kebankrapan 1967 dan dengan itu berhak untuk menguatkuasakan penghakiman.

(2) Bercanggahan dengan *Re Arunachalam* dan *Re United Marine Supply Co*, notis kebankrapan di dalam rayuan semasa menunjukkan satu ciri yang berbeza, iaitu penghutang di sini tidak membuat apa-apa pembayaran bagi memenuhi atau

memenuhi sebahagian dari penghakiman muktamad berkenaan. Kebergantungan penghutang ke atas kes-kes ini dengan itu tidak boleh dipertahankan.

(3) Alasan-alasan yang dibangkitkan di dalam permohonan penghutang harus dibangkitkan sama ada di dalam guaman sivil atau guaman lelongan atau kes Mahkamah Agong. Kegagalan atau keengganan atau kecuaian penghutang untuk berbuat demikian telah menjejaskan rayuan penghutang di hadapan Mahkamah Tinggi dan di rayuan di sini setakat yang berkaitan dengan NK. Kegagalan atau keengganan atau kecuaian penghutang untuk membangkitkan alasan-alasan tersebut di forumnya yang betul juga menunjukkan ketandusan *bona fide* di pihaknya.

(4) Tidak dipertikai bahawa NK adalah dalam format yang ditetapkan, telah menyatakan akibat-akibat dari ketidakpatuhan kepadanya dan telah disampaikan melalui cara yang ditetapkan oleh s. 3(2) Akta Kebankrapan 1967. Penghutang gagal mematuhi syarat-syarat NK pemiutang dan dengan itu telah melakukan perbuatan kebankrapan. Ianya mengikut bahawa Mahkamah Tinggi betul apabila menolak permohonan.

Case(s) referred to:
In Re Easton [1893] 10 Mor 111 ***(refd)***
Re Arunachalam ex p Indian Overseas Bank Ltd [1968] 1 MLJ 89 HC ***(dist)***
Re Khoo Chee Tong; ex p Unik (M) Sdn Bhd [1996] 2 BLJ 475 HC ***(refd)***
Re United Marine Supply Co [1960] 26 MLJ 305 HC ***(dist)***
Sovereign General Insurance Sdn. Bhd v. Koh Tiam Bee [1988] 1 MLJ 304 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i), (2)(ii)
Bankruptcy Rules 1969, r. 95
Rules of the High Court 1980, O. 14A

For the appellant - Dato' Bastion Pius Vendargon; M/s Vendargon & Partners
For the respondent - Hon Kai Peng; M/s HY Lee & Hee

[Appeal from High Court, Kuantan; Bankruptcy No: 29-534-1994]

Reported by WA Sharif

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JUDGMENT

Low Hop Bing JCA:

Introduction

B **[1]** This is an appeal against the decision of the learned High Court judge in allowing the judgment creditor's appeal and setting aside the decision of the registrar. The learned judge had in essence dismissed the application filed by the judgment debtor ("the JD") under r. 95 of the Bankruptcy Rules 1969 ("r. 95").

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[2] The JD had appealed against the learned judge's decision.

[3] This appeal was heard and dismissed on 20 June 2007. We now give our grounds.

D **[4]** Parties have agreed that the outcome of this appeal shall also bind the parties in two other appeals *viz* Civil Appeals No: C-03-26-2001; and No: C-03-27-2001, pending in this court.

Factual Background

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[5] On 31 October 1994, RHB Bank Berhad, the judgment creditor ("JC") filed a bankruptcy notice against the JD to recover the sum of RM129,843.47, based on a judgment obtained under O. 14A of the Rules of the High Court 1980 on 2 February 1989 in Kuantan High Court Civil Suit No. 232-93-1998 ("the civil F suit"). There was no appeal against that judgment.

[6] On 20 May 1995, the JD filed an affidavit in encl. (7) under r. 95. That was the JD's application to set aside the bankruptcy notice ("the JD's application").

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[7] The JD's application was in relation to an auction of charged property pursuant to an order for sale granted by the Kuantan High Court in OS No. 31-235-1986. ("the auction suit"). The grounds of the JD's application are:

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(1) The JC's claim for RM511.97 against the JD allegedly for legal fees, costs and expenses relating to Supreme Court Case No. 03-15-1989 ("the Supreme Court case") was wrong in law (para 3.1. of the affidavit);

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(2) The demand contained in the JC's bankruptcy notice should set off or reduce the sum of RM33,797.25 which was the interest charged by the JC against the JD for the JC's own wrongful conduct in undervaluing the charged property (para 3.2 *ibid*);

(3) There was a breach by the bidder who bidded for RM160,000 for the charged property, paid 10% deposit but failed to pay the balance within the prescribed 90 days (para 3.3, *ibid*); and

(4) The 10% deposit paid by the bidder should have been forfeited and credited to the JD's account (para 3.4, *ibid*).

[8] On 14 August 1995, the JC filed an affidavit in reply thereto.

[9] The JD's application was heard on 12 March 1996 by the High Court registrar who set aside the JC's bankruptcy notice with costs.

[10] On 12 March 1996, *vide* encl. 11A, the JC filed an appeal to judge in chambers.

[11] On 26 July 2001, the learned judge allowed the JC's appeal with costs and reinstated the JC's bankruptcy notice. Hence, this appeal.

Act Of Bankruptcy

[12] Learned counsel Dato' Bastian Pius Vendargon relied on the grounds set out in the JD's affidavit, and submitted that the JD had committed no act of bankruptcy, citing:

(1) Section 3(1)(i) and s. 3(2)(ii) of the Bankruptcy Act 1967;

(2) *Re Arunachalam ex p. Indian Overseas Bank. Ltd* [1968] 1 MLJ 89 HC;

(3) *Re United Marine Supply Co.* [1960] 26 MLJ 305 HC Singapore; and

(4) *Sovereign General Insurance Sdn. Bhd v. Koh Tiam Bee* [1988] 1 MLJ 304 SC.

[13] JC's learned counsel Mr. Hon Kai Peng contended that:

A (1) the grounds raised in the JD's application should have been raised in the civil suit, the auction suit; and/or in the Supreme Court case and the court exercising jurisdiction in bankruptcy proceedings cannot go behind the judgment obtained, relying also on *Sovereign General Insurance Sdn. Bhd, supra*; and

B (2) the JD's objection is not *bona fide*, on the strength of *Re Khoo Chee Tong: Ex Parte Unik (M) Sdn. Bhd* [1996] 2 BLJ 475 HC.

[14] We found that in the civil suit, the O. 14A judgment which led to the JC's request for the issue of the bankruptcy notice against the JD is a final judgment as the JD has preferred no appeal nor obtained a stay of execution. The JC is entitled to enforce the final judgment. The JC is deemed to be a creditor under the proviso to s. 3(1)(i) of the Bankruptcy Act 1967 which, where relevant, provides *inter alia* to the effect that any person who is for the time being entitled to enforce a final judgment shall be deemed to be a creditor.

[15] There is no dispute that the JC's bankruptcy notice is in the prescribed form and has stated the consequences of non-compliance therewith and has been served in the prescribed manner under s. 3(2) of the same Act.

[16] The result of our consideration of the authorities cited for the JD is reflected in the analysis below.

[17] In *Re Arunachalam, supra,* the bankruptcy notice demanded satisfaction of a judgment for RM4,344.64 as on 24 July 1967. It was undisputed that RM300 had been paid by the JD there, so that only RM4,044.64 was owing on the judgment. Chang Min Tat J (later FJ) invoked proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 and held that the bankruptcy notice was invalid as it referred to a sum in respect of which the JC could not have issued execution, in which case, the bankruptcy notice was set aside.

[18] In *Re United Marine Supply Co, supra*, the bankruptcy notice was for a claim which was more than the debt due. The claim for balance due on a final judgment had erroneously included a sum of $50 which had been accepted by the creditor as payment towards the judgment debt. Rose CJ (Singapore) upheld the JD's contention that the defect, being not a mere formal defect or irregularity, could not be rectified by the court.

[19] Except for the different amounts, both *Re Arunachalam, supra;* and *Re Untied Marine Supply Co. supra,* share substantially similar facts. A

[20] However, in sharp contrast to *Re Arunachalam, supra,* and *Re United Marine Supply Co, supra,* the bankruptcy notice in the instant appeal carries a distinguishing feature in that the JD has made no payment in satisfaction or part satisfaction of a final judgment. That being the case, we are of the view that the JD's reliance thereon is unsustainable. B

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[21] It deserves to be noted that the grounds enumerated in the JD's application were based on the auction suit which has proceeded to the then Supreme Court by way of the Supreme Court case. Further, the JD has not lodged any appeal against the final judgment obtained by the JC under O. 14A in the civil suit which led to the issuance of the bankruptcy notice against the JD. The grounds raised in the JD's application should have been ventilated in the civil suit, the auction suit or the Supreme Court case. The JD's failure, refusal or neglect to do so would in our view militate against the JD's appeal before the High Court and now in the instant appeal in so far as the bankruptcy notice is concerned. D E

[22] In *Sovereign General Insurance Sdn. Bhd, supra,* pursuant to a judgment, a bankruptcy notice was issued against the JD who failed to comply therewith. The JC took out a creditor's petition which was struck out by the High Court judge who in the exercise of his jurisdiction in bankruptcy proceedings went behind the judgment and disputed the validity of the orders made in earlier execution proceedings when the orders have not been set aside. On appeal, the then Supreme Court in a judgment delivered by Lee Hun Hoe CJ (Borneo) (as he then was) disapproved of the approach adopted by the High Court judge. At p. 305, the Supreme Court referred to *In Re Easton* [1893] 10 Mor. 111; 9 TLR 409 and held that the High Court in exercising jurisdiction in bankruptcy proceedings, eg, in an application to set aside a bankruptcy notice, could not go behind the judgment. F G H

[23] The above principle enunciated in *Sovereign General Insurance, supra,* was followed by Haidar J (later CJ(M)) in *Re Khoo Chee Tong, supra,* where the Court dismissed the JD's attempt to set aside the bankruptcy notice on the ground, *inter alia,* that the judgment on which the bankruptcy notice was based was tainted with illegality. I

[24] Quite apart from that, the JD's failure, refusal or neglect to raise the aforesaid grounds in the proper forum *viz* either in the civil suit, the auction suit or the Supreme Court case clearly demonstrates a total lack of *bona fide* on the part of the JD.

[25] A similar situation arose in *Khoo Chee Tong, supra,* where the JD had never challenged the judgment entered against him but did so only when he filed a notice of motion (which was held to be procedurally wrong) alleging, *inter alia*, that the judgment was tainted with illegality. It was held to be lacking in *bona fide.*

[26] Reverting to the mainstream of the factual background herein, it is obvious that the JD has failed to comply with the requirements of the JC's bankruptcy notice. Consequently, he has committed an act of bankruptcy. We hold that the High Court has arrived at a correct decision in dismissing the JD's application.

Conclusion

[27] On the foregoing grounds, we find no merits in the JD's appeal. By unanimous decision, the JD's appeal is hereby dismissed with costs. The orders of the High Court are affirmed. Deposit to the JC towards account of taxed costs.

[28] Mokhtar Haji Sidin, JCA (as he then was) has retired in September 2007. Md Raus Sharif, JCA who has read this judgment in draft has expressed his agreement for it to be the judgment of this court.